

***AUSTRALIA – CERTAIN MEASURES CONCERNING TRADEMARKS,
GEOGRAPHICAL INDICATIONS AND OTHER PLAIN PACKAGING
REQUIREMENTS APPLICABLE TO TOBACCO PRODUCTS AND
PACKAGING***

(DS435 / DS441)

**THIRD PARTICIPANT SUBMISSION
OF THE UNITED STATES OF AMERICA**

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SERVICE LIST

Participants

H.E. Ms. Frances Lisson, Ambassador Permanent Mission of Australia

H.E. Mr. Dacio Castillo, Ambassador Permanent Mission of Honduras

H.E. Ms. Claudia Hernandez Bona, Ambassador Permanent Mission of the Dominican Republic

Third Participants

H.E. Mr. Carlos Mario Foradori, Ambassador Permanent Mission of Argentina

H.E. Mr. Evandro Didonet, Ambassador Permanent Mission of Brazil

H.E. Mr. Stephen De Boer, Ambassador Permanent Mission of Canada

H.E. Mr. Eduardo Galvez Carvallo, Ambassador Permanent Mission of Chile

H.E. Mr. Zhang Xiangchen, Ambassador Permanent Mission of the People's Republic of China

H.E. Mr. Pedro Luis Pedroso Cuesta, Ambassador Permanent Mission of Cuba

H.E. Mr. Diego Aulestia, Ambassador Permanent Mission of Ecuador

H.E. Mr. Marc Vanheukelen, Ambassador Permanent Mission of the European Union

H.E. Mr. Eduardo Ernesto Sperisen-Yurt, Ambassador Permanent Mission of Guatemala

H.E. Mr. J.S. Deepak, Ambassador Permanent Mission of India

H.E. Mr. Hasan Kleib, Ambassador Permanent Mission of Indonesia

H.E. Mr. Junichi Ihara, Ambassador Permanent Mission of Japan

H.E. Mr. Kim Young-moo, Ambassador, Deputy Permanent Representative Permanent Mission of the Republic of Korea

H.E. Mr. Robert Dufter Salama, Ambassador Permanent Mission of Malawi

Ms. Fadzilah Abu Hasan, Charge d'affaires a.i Permanent Mission of Malaysia

H.E. Mr. Roberto Zapata Barradas, Ambassador Permanent Mission of Mexico

H.E. Dr. David Walker, Ambassador Permanent Mission of New Zealand

Mr. Carlos Morales Davila, Charge d'affaires a.i. Permanent Mission of Nicaragua

Mr. Suleman Adebayo Audu, Charge d'affaires a.i. Permanent Mission of Nigeria

H.E. Mr. Dagfinn Sorli, Ambassador Permanent Mission of Norway

H.E. Mr. Abdulla Nasser Musallam Al Rahbi, Ambassador Permanent Mission of Oman

H.E. Mr. Alfredo Suescum, Ambassador Permanent Mission of Panama

H.E. Mr. Claudio De La Puente, Ambassador Permanent Mission of Peru
H.E. Mr. Manuel A.J. Teehankee, Ambassador Permanent Mission of the Philippines
H.E. Mr. Gennady Ovechko, Ambassador Permanent Mission of the Russian Federation
H.E. Mr. Saleh Alhusseini, Ambassador Permanent Mission of the Kingdom of Saudi Arabia
H.E. Ms. Tan Yee Woan, Ambassador Permanent Mission of Singapore
H.E. Mr. Xavier Carim, Ambassador Permanent Mission of South Africa
Dr. C. Y. Cyrus Chu, Permanent Representative, Permanent Mission of the Separate Customs
Territory of Taiwan, Penghu, Kinmen and Matsu
Mr. Paisan Rupanichkij, Permanent Mission of Thailand
H.E. Ms. Makeda Antoine, Ambassador Permanent Mission of Trinidad and Tobago
H.E. Mr. Kemal Madenoglu, Ambassador Permanent Mission of Turkey
H.E. Mr. Yurii Klymenko, Ambassador Permanent Mission of the Ukraine
H.E. Mr. Jose Luis Cancela Gomez, Ambassador Permanent Mission of Uruguay
Ms. Margaret Mary Lungu Kaemba, Charge d'affaires a.i. Permanent Mission of Zambia
H.E. Mr. Taonga Mushayavanhu, Ambassador Permanent Mission of the Republic of Zimbabwe

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SHORT TITLE	FULL CASE TITLE AND CITATION
<i>Australia – Tobacco Plain Packaging (Honduras, DR) (Panel)</i>	Panel Reports, <i>Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Packaging Requirements Applicable to Tobacco Products and Packaging</i> , WT/DS435/R, WT/DS441/R, and Add. 1, circulated 28 June 2018
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 12 September 2005
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and 4
<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 14 December 1999
<i>US – Clove Cigarettes (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 4 April 2012
<i>US – Countervailing Measures (China) (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 18 December 2014

<i>US – Tuna II (Mexico) (AB)</i>	<i>Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted 13 June 2012</i>
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I. INTRODUCTION

1. The United States welcomes the opportunity to present its views on issues raised on appeal by Honduras and the Dominican Republic. Pursuant to the communication from the Division on July 23, 2018, the United States is providing its third-participant submissions in the appeals in these two disputes as a single document.¹ In this document, the United States will present its views on the proper legal treatment of the *Declaration on the TRIPS Agreement and Public Health* (“Doha Declaration on TRIPS”) and the claims raised in relation to Articles 7.1 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

2. The United States focuses on the two sets of issues identified above to address systemic concerns that arise from these appeals. A proper resolution of these two sets of issues would not disturb the ultimate conclusions of the Panel in these disputes.

II. CLARIFICATION REGARDING THE PANEL’S TREATMENT OF THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH

A. Introduction

3. In its report, the Panel considered the types of reasons that would sufficiently support the application of an encumbrance on the use of a trademark so as to determine the meaning of the term “unjustifiably” in Article 20 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS Agreement”).² According to the Panel, Article 20 of the TRIPS Agreement “does not expressly identify the types of reasons that may form the basis for the ‘justifiability’ of an encumbrance.”³ The Panel correctly understood that, consistent with Article 3.2 of the DSU, it should interpret the term applying customary rules of interpretation of public international law, reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (“Vienna Convention”).

4. In this case, the Panel first looked to the ordinary meaning of the term “unjustifiably” and determined that the term “refers to the ability to provide a ‘justification’ or ‘good reason’ for the relevant action or situation that is reasonable in the sense that it provides sufficient support for that action or situation.”⁴ Looking back to Article 20 of the TRIPS Agreement, the Panel noted that “the term ‘unjustifiably’ qualifies the verb encumbered” and therefore, the dictionary definitions already identified by the Panel “suggest that the term ‘unjustifiably,’ as used in Article 20, connotes a situation where the use of a trademark is encumbered by special requirements in a manner that lacks a justification or reason that is sufficient to support the resulting encumbrance.”⁵

¹ See Appellate Body Procedural Ruling (23 July 2018).

² Panel Report, para. 7.2396 *et seq.*

³ *Id.* at para. 7.2397.

⁴ *Id.* at para. 7.2395.

⁵ *Id.* at para. 7.2395.

5. The Panel went on, that its conclusion “implies that there may be circumstances in which good reasons exist that sufficiently support the application of encumbrances on the use of a trademark in a reasonable manner.”⁶ Because “Article 20 [of the TRIPS Agreement] does not expressly identify the types of reasons that may form the basis for the ‘justifiability’ of an encumbrance,” the Panel sought “guidance in this respect in the context provided by other provisions of the TRIPS Agreement.”⁷ The Panel then looked to the first recital of the preamble and the text of Articles 7 and 8 of the TRIPS Agreement.

6. The Panel noted that “Articles 7 and 8, together with the preamble of the TRIPS Agreement, set out general goals and principles underlying the TRIPS Agreement.”⁸ The Panel determined that Article 8.1 of the TRIPS Agreement “unquestionably identif[ies] public health” as a societal interest, where such interest “may provide a basis for the justification of measures under the specific terms of Article 20.”⁹

7. The Panel went on to note that paragraph 5(a) of the Doha Declaration on TRIPS, a 2001 document from the Doha Ministerial, provides that “[i]n applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.”¹⁰ The Panel then made clear that the Doha Declaration on TRIPS “was made in the specific context of a re-affirmation by Members of the flexibilities provided in the TRIPS Agreement in relation to measures taken for the protection of public health”¹¹ and that paragraph 5(a) of the Doha Declaration on TRIPS “*may*, in our view, be considered to constitute a ‘subsequent agreement’ of WTO Members within the meaning of Article 31(3)(a) of the Vienna Convention.”¹²

8. On appeal, Honduras argues that the Panel committed legal error finding that paragraph 5 of the Doha Declaration on TRIPS “constitutes a ‘subsequent agreement’ in the sense of Article 31.3(a) of the Vienna Convention that must be taken into consideration as part of the context of the term ‘unjustifiably’ in Article 20 of the TRIPS Agreement.”¹³ Honduras asserts that paragraph 5(a) “merely confirms the general interpretive rule of reading all provisions of the TRIPS Agreement in the light of the objectives and principles of the [TRIPS] Agreement.”¹⁴ Honduras asserts that paragraph 5(a) of the Doha Declaration on TRIPS “does not ‘bear specifically’ on the interpretation and application of the respective term or provision and cannot be said to ‘clearly express a common understanding, and an acceptance of that understanding

⁶ *Id.* at para. 7.2396.

⁷ *Id.* at para. 7.2397.

⁸ *Id.* at para. 7.2402.

⁹ *Id.* at para. 7.2406.

¹⁰ *Id.* at para. 7.2407.

¹¹ *Id.* at para. 7.2408.

¹² *Id.* at para. 7.2409 (italics added).

¹³ Honduras Appellant Submission, para. 254.

¹⁴ *Id.*

among Members’ with regard to the meaning of the term ‘unjustifiably’ in Article 20 of the TRIPS Agreement.”¹⁵

9. In response, Australia argues against the claim by Honduras that the Panel found that the Doha Declaration on TRIPS is a subsequent agreement to the TRIPS Agreement.¹⁶ Australia notes that the purpose for which the Panel referred to the Doha Declaration on TRIPS was “merely to confirm that public health considerations are ‘unquestionably’ within the societal interests that can ‘justify’ an encumbrance upon the use of trademarks.”¹⁷ According to Australia, the issue of whether the Doha Declaration on TRIPS is a subsequent agreement is “ultimately beside the point” to the Panel’s findings regarding the meaning of “unjustifiably” in Article 20 of the TRIPS Agreement.¹⁸ Australia goes on to highlight that “Article 8.1 of the TRIPS Agreement, by itself, makes clear that Members may adopt measures necessary for the protection of public health, provided those measures are otherwise consistent with the TRIPS Agreement.”¹⁹

10. It does not appear necessary to address Honduras’s specific claim of error relating to the Panel’s approach to the Doha Declaration. First, contrary to the assertions of Honduras, it is unclear whether the Panel relied on the Doha Declaration on TRIPS as a subsequent agreement for the purposes of Vienna Convention interpretation of “unjustifiably.” In its report, the Panel stated that paragraph 5(a) of the Doha Declaration on TRIPS “may ... be considered to constitute a subsequent agreement” to the TRIPS Agreement for the purposes of interpreting the term “unjustifiably” in Article 20 of the TRIPS Agreement.²⁰ The Panel may be using the “may be” phrase to suggest possibility, rather than permission (as, in that construction, the Panel would be permitting itself to consider the Declaration so).²¹

11. Second, the Panel found that the “guidance provided by the Doha Declaration is consistent, as the Declaration itself suggests, with the applicable rules of interpretation”.²² Honduras acknowledges this statement as correct.²³ Thus, the Panel’s findings regarding the meaning of “unjustifiably” in Article 20 of the TRIPS Agreement did not turn on any particular

¹⁵ *Id.* In contrast, Honduras cites to the holding in *US – Clove Cigarettes*, paragraph 262, to highlight that the “Doha Declaration in general or paragraph 5(a) in particular do not ‘express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law.” Honduras Appellant Submission, para. 255 (emphases in original quotation).

¹⁶ Australia Appellee Submission, para. 242.

¹⁷ *Id.* (citing Panel Report, paras. 7.2406 and 7.2411).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Panel Report, para. 7.2409.

²¹ “Consider” means to think carefully about (something), typically before making a decision” and “regard (someone or something) as having a specified quality.” Ambiguity results from the use of “may,” which may refer to “weak possibility in the present or future,” with consider. “May be considered” is the present tense, passive voice construction.

²² *Id.* at para. 7.2411.

²³ *See, e.g.*, Honduras Appellant Submission, para. 55 (“Paragraph 5 of the Doha Declaration merely confirms the general interpretive rule of reading all provisions of the TRIPS Agreement in the light of the objectives and principles of the Agreement.”).

interpretive direction from the Doha Declaration on TRIPS. No reversal of the Panel’s alleged treatment of the Doha Declaration as a “subsequent agreement on interpretation” would alter the correctness of (or basis for) the Panel’s interpretation of the term “unjustifiably.”

12. Third, to the extent the Panel did conclude that the Doha Declaration on TRIPS was a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention, the Panel’s finding did not extend to the entirety of the Doha Declaration, but only to the specific statement found in paragraph 5(a), which was the only portion of the Declaration analyzed by the Panel.²⁴ To review that alleged finding by the Panel, the Appellate Body would first need to consider whether a Declaration adopted by Ministers can serve as a “subsequent agreement on interpretation” in light of the express procedures set out in Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization* (“WTO Agreement”).

13. Article IX:2 reserves to the Ministerial Conference or the General Council the “exclusive authority to adopt interpretations” of the WTO Agreement. The provision also sets out that “they shall exercise that authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement.” No such recommendation was made by the TRIPS Council, which oversees the TRIPS Agreement, and the Doha Declaration was not adopted pursuant to Article IX:2. To deem the Doha Declaration to be a subsequent agreement, therefore, would introduce through dispute settlement another means of rendering an interpretation not set out in the WTO Agreement and not explicitly given to the Ministerial Conference.²⁵ This would require considering whether the institutional structure and procedures of the WTO Agreement are effectively being amended, without formal amendment.

14. The issue of whether statements agreed by Members may constitute a “subsequent agreement on interpretation” has raised difficulties for the functioning of some WTO committees.²⁶ Rather than engage in this appeal on this issue, the Appellate Body could instead

²⁴ Panel Report, para. 7.2407 (quoting paragraph 5(a) of the Doha Declaration on TRIPS: “We note in this respect that the Doha Declaration, adopted by Ministers on 14 November 2001, provides that, ‘[i]n applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.’”).

²⁵ See WTO Agreement, Art. IV:1 (“The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, *in accordance with the specific requirements for decision-making in this Agreement* and in the relevant Multilateral Trade Agreement.”) (italics added).

²⁶ Not surprisingly, the issue of whether an agreed statement by Members potentially bearing on the interpretation of a provision of a covered agreement could constitute a “subsequent agreement” has caused difficulties for Members. See Statement of the United States, 24 April 2012 Meeting of the DSB (WT/DSB/M/315), para. 78 (“However, by treating paragraph 5.2 of the Doha Decision as a ‘subsequent agreement’ that establishes the meaning of the covered agreements, the Appellate Body report effectively eliminates the safeguards that Members have included in Article IX:2 of the WTO Agreement. Furthermore, there appears to be nothing in the Appellate Body’s approach to limit such a ‘subsequent agreement’ to one by the Ministerial Conference or the General Council.”). For example, WTO Members discussed the issue and proposals for a “disclaimer” at length in recent meetings of the SPS Committee. The document in question was adopted only after extensive debate resulted in agreement to a “compromise” or “soft” disclaimer. See Committee on Sanitary and Phytosanitary Measures, G/SPS/R/90, paras. 4.39-4.57 (4.51: “In conclusion, the Chairperson had noted that the presentation and the resulting discussion had provided additional clarification on disclaimers in Committee decisions. There was almost universal support for the inclusion of a “soft”

exercise judicial economy over Honduras’s claim of error, which has no bearing on the outcome of any appeal of the Panel’s legal interpretation or conclusion under Article 20.

B. Interpretation of “Unjustifiably” for the Purposes of Article 20 of the TRIPS Agreement

15. Even had the Panel considered paragraph 5(a) of the Doha Declaration on TRIPS to be a subsequent agreement for the purposes of customary rules of interpretation, the Panel’s reference to paragraph 5(a) did not change its interpretive approach when interpreting the term “unjustifiably” in Article 20 of the TRIPS Agreement. The Panel expressly viewed paragraph 5(a) of the Doha Declaration on TRIPS as directing an interpreter to conduct the analysis under customary rules in the light of the principles and objectives in the TRIPS Agreement, which the Panel did examine.

16. Among other claims, all Complainants asserted that Australia’s tobacco plain packaging measures breach Article 20 of the TRIPS Agreement.²⁷ Prior to the disputes, a panel had not had an opportunity to define the term “unjustifiably” in Article 20 for the purposes of a TRIPS dispute.²⁸

17. Article 20 of the TRIPS Agreement states:

The use of a trademark in the course of trade *shall not be unjustifiably* encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to,

disclaimer in the document, as proposed in RD/SPS/16. The Chairperson stressed that Members needed to find a way to move forward and reach a compromise. This would also help the Committee to focus on the upcoming Fifth Review.”); Committee on Sanitary and Phytosanitary Measures, *Catalogue of Instruments Available to WTO Members to Manage SPS Issues*, G/SPS/63 (26 March 2018), paras. 1-2 (“The Catalogue is intended only as a reference document to help Members address and manage SPS issues. It aims to facilitate the task of officials working on SPS issues by identifying relevant legal provisions, Committee work, and some other resources available for particular SPS-related tasks or activities. Their inclusion in the Catalogue is not meant to suggest that these instruments constitute necessary or mandatory steps in the completion of a certain task or activity. [] This Catalogue neither adds to nor detracts from the existing rights and obligations of Members under the SPS Agreement or any other WTO Agreement.”).

²⁷ See WT/DS435/16, WT/DS441/15, WT/DS458/15, WT/DS467/16.

²⁸ Panel Report, para. 7.2328 (citing to the submission of Australia that “no prior panel has had occasion to consider the meaning of the term ‘unjustifiably’ as it appears in Article 20 [of the TRIPS Agreement]”). Article 20 of the TRIPS Agreement was raised in connection with Article 3 of the TRIPS Agreement in the *Indonesia – Autos* dispute but the Panel in that dispute determined that the provisions of the program at issue are not “requirements” under Article 20 of the TRIPS Agreement and therefore the Panel did not reach the issue of defining the term “unjustifiably.” *Indonesia – Autos*, paras. 14.277-14.278.

the trademark distinguishing the specific goods or services in question of that undertaking.²⁹

18. The TRIPS Agreement does not provide a definition for the term “unjustifiably,” either in the text of Article 20 itself or in the other provisions of the TRIPS Agreement, so it is necessary to interpret the term “in accordance with customary rules or interpretation of public international law.” Therefore, the Panel looked first to “the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose” in accordance with Article 31(1) of the Vienna Convention.³⁰ As summarized above, the Panel concluded that the dictionary definitions of the term “unjustifiably” suggested that there may be “good reasons” to “sufficiently support the application of encumbrances on the use of a trademark in a reasonable manner.”³¹ After the Panel could not identify such reasons in the text of Article 20 itself, the Panel then considered other provisions of the TRIPS Agreement.

19. In its review, the Panel identified the preamble and Articles 7 and 8 of TRIPS Agreement as relevant to its identification of those types of reasons that may provide the basis for justifiable encumbrances so as to properly interpret the term “unjustifiably” as it relates to Article 20 of the TRIPS Agreement.

20. The Preamble of the TRIPS Agreement states that, in making the TRIPS Agreement, the Members took “into account the need to promote effective and adequate protection of intellectual property rights” and recognized the “need for new rules and disciplines concerning... (b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights; [and] (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems....”

21. Article 7 of the TRIPS Agreement, entitled “Objectives,” provides the objectives for Members to protect and enforce intellectual property rights:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

22. In particular, Article 7 of the TRIPS Agreement states that one of the objectives of the TRIPS Agreement is that “the protection and enforcement of intellectual property rights should contribute ... to a balance of rights and obligations.”

²⁹ Italics added for clarity.

³⁰ Panel Report, para. 7.2393; see also the Panel’s conclusions regarding the dictionary meanings in paragraphs 7.2394–7.2395.

³¹ *Id.* at para. 7.2396.

23. Finally, Article 8 of the TRIPS Agreement, entitled “Principles,” restates the principles of the TRIPS Agreement in Article 8.1 that:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

24. In other words, Members may adopt measures to achieve the listed objectives in Article 8.1 of the TRIPS Agreement, but the objectives nevertheless do not provide exceptions to Members’ obligations in the TRIPS Agreement as Members may adopt measures “provided that such measures are consistent with the provisions of this [TRIPS] Agreement.”³²

25. After completing its analysis under Article 31(2) of the Vienna Convention, the Panel then looked to the text of paragraph 5(a) of the Doha Declaration on TRIPS, adopted by Ministers on 14 November 2001,³³ for its analysis.

26. Paragraph 5(a) of the Doha Declaration on TRIPS states:

In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.

27. The Panel referred to the declaration as “guidance” that was “consistent, as the Declaration itself suggests, with the applicable rules of interpretation, which require a treaty interpreter to take account of the context and object and purpose of the treaty being interpreted.”³⁴

28. The Panel went on that this “confirms in our view that Article 7 and 8 of the TRIPS Agreement provide important context for the interpretation of Article 20.” It is clear from the Panel’s report that even if it did consider paragraph 5(a) of the Doha Declaration on TRIPS to be a subsequent agreement, the Panel’s interpretation would have been the same if it had not so considered the Doha Declaration.

29. Paragraph 5(a) by its terms confirms the general interpretive rule of reading all provisions of the TRIPS Agreement in light of the objectives and principles of the Agreement by stating that “each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.” Paragraph 5(a) of the Doha Declaration on TRIPS does not explicitly refer to or define the term “unjustifiably” as found in Article 20 of the TRIPS Agreement. Therefore, even were a statement agreed by

³² TRIPS Article 8.1.

³³ WT/MIN(01)/DEC/2.

³⁴ Panel Report, para. 7.2410.

Members outside the procedure of Article IX:2 of the WTO Agreement to be capable of constituting a subsequent agreement on interpretation, paragraph 5(a) does not speak to the interpretation of a specific TRIP Agreement provision, or a term in such a provision.³⁵

30. The Panel relied on the ordinary meaning of “unjustifiably” along with the language of the preamble and Articles 7 and 8.1 of the TRIPS Agreement for the purposes of Vienna Convention interpretation to determine the meaning of the term “unjustifiably” in Article 20 of the TRIPS Agreement. Its interpretation did not turn on whether or not it considered paragraph 5(a) of the Doha Declaration to be a “subsequent agreement”; in fact, its interpretation would not have changed either way.

III. COMPLAINANTS’ CLAIMS OF ERROR UNDER THE DSU

A. Introduction: Two Appeals Under the DSU Should be Rejected

31. Honduras and the Dominican Republic both seek to appeal dozens of factual findings under DSU Article 11. Both appeals to the Appellate Body make numerous claims under Article 11 of the DSU of what clearly are alleged factual errors by the Panel. By agreement of all WTO Members, the DSU expressly limits the scope of an appeal to alleged *legal errors* by a panel, not factual errors.³⁶ The United States disagrees with these attempts to re-litigate dozens of unfavorable factual determinations by the Panel through claims of breach of Article 11 of the DSU.

32. The appeals of Honduras and the Dominican Republic in this dispute highlight the burden placed on the Appellate Body and other parties when parties appeal what are clearly factual determinations by a panel through characterizing such determinations as a failure of a panel’s obligation to make an “objective assessment” under Article 11 of the DSU. The Appellate Body has an opportunity in this appeal to reconsider how its originally limited approach to review the “objective assessment” of a panel has been seized by appellants to cover practically all factual determinations by a panel. Given the lack of textual basis in the DSU for appellate review of panel fact-finding, the Appellate Body should instead reassert that the proper issues for appeal are limited to issues of law and legal interpretations covered by a panel report.³⁷

33. In addition, the United States agrees with Australia that the Dominican Republic’s claim of a breach under Article 7.1 of the DSU is unfounded. The claim appears to be an attempt to reopen the dispute by incorrectly alleging that the Panel failed to address the Dominican Republic’s claim that Australia’s plain packaging measures as to individual cigarette packaging breach Article 20 of the TRIPS Agreement. The Panel did address this claim, and the issue

³⁵ For example, the Appellate Body in *US – Tuna II (Mexico)* found that the extent to which a decision will inform the interpretation and application of a term or provision of a WTO Agreement “will depend on the degree to which it ‘bears specifically’ on the interpretation or application of the respective term or provision” *US – Tuna II (Mexico) (AB)*, para. 372.

³⁶ See DSU Article 17.6.

³⁷ *Id.* (“An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.”).

would in any event go to an erroneous legal conclusion, not a terms of reference issue. Both of these bases for appeal are seriously flawed and must be rejected.

B. Appeals of Alleged Factual Errors under Article 11 of the DSU

1. Introduction: The Parties' Arguments

34. Regarding the claims of breach under Article 11 of the DSU, both Honduras and the Dominican Republic make numerous allegations that rest on detailed claims of factual error by the Panel. For the purposes of this submission, the United States briefly summarizes and groups together the claims below.

35. Honduras alleges, among other claims, that the Panel failed to make an objective assessment under Article 11 of the DSU in the Panel's examination of the evidence on the degree of contribution of Australia's measures on plain packaging for tobacco products in the context of alleged breach of Article 2.2 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement").³⁸ Supporting its Article 11 breach claim, Honduras concedes that "not every error of judgment in the appreciation of the evidence amounts to a breach of Article 11 of the DSU," but suggests that "it may well be the case that a combination of such errors in appreciation, taken together, cast doubt on the 'objectivity' of the Panel's analysis."³⁹ Honduras identifies numerous errors of the Panel that combine to demonstrate an "overall lack of objective assessment" as to the evidence on the degree of contribution of the measure for the purposes of analysis of the Article 2.2 of the TBT Agreement breach claim, offering a number of alternative theories as follows:

The errors of the Panel thus combine many of the categories identified above and can be described as a failure to provide an adequate and reasonable explanation of how the facts support the determination made; or as a lack of even-handedness and the application of a double standard or proof; or as making the case for one of the parties; or a failure to conduct a critical and searching analysis; or as a willful disregard of the evidence; or a combination of all of these which reflect an overall lack of objective assessment when it comes to the examination of the evidence on the degree of contribution of the measure.⁴⁰

36. In light of its claims, Honduras requests that the Appellate Body reverse the Panel's findings as to the evidence on the degree of contribution of the measures due to the Panel's failure to make an objective assessment of the facts and therefore render the Panel's findings "moot and of no effect" regarding the claims of breach under Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement.⁴¹

³⁸ *Id.* at paras. 696–1080.

³⁹ *Id.* at para. 702.

⁴⁰ *Id.* at para. 710.

⁴¹ *Id.* at para. 1080.

37. The Dominican Republic also alleges that the Panel failed to make an objective assessment under Article 11 of the DSU in relation to the Panel’s findings regarding the claims of breach of Article 2.2 of the TBT Agreement. In its appellant submission, the Dominican Republic alleges that, among other claims of error, the Panel made “errors in its assessment of the evidence and argument relevant to the Panel’s prevalence and consumption findings” where “such errors rise to the level of an Article 11 violation.”⁴² The Dominican Republic “explains why the Panel’s failure to undertake an objective assessment of the post-implementation evidence concerning the impact of the TPP measures on *actual* smoking behaviors in Australia must result in reversal of its overall conclusion on the contribution of the TPP measures to Australia’s objective.”⁴³ The appeal submission details two sets of errors, one set “relat[ing] to the Panel’s treatment of the *benchmark rate* of decline in smoking (i.e., trend)” and the “second set of errors relat[ing] to the *robustness criteria* used by the Panel to assess the parties’ evidence.”⁴⁴

38. In the alternative, the submission of the Dominican Republic also alleges that the Panel failed to make an objective assessment as to the pre-implementation evidence on the anticipated impact of the TPP measures as well.⁴⁵ Finally, the Dominican Republic alleged that the Panel failed to make an objective assessment under Article 11 of the DSU as to the claims of breach of the Article 2.2 of the TBT Agreement, including the Panel’s assessment of trade-restrictiveness and less trade-restrictive alternatives, and that those errors also resulted in a breach of Article 11 of the DSU in the Panel’s findings under Article 20 of the TRIPS Agreement.⁴⁶

39. In response to the Complainants’ claims of error under Article 11 of the DSU, Australia contends that as for the Panel’s determinations regarding the trade-restrictiveness of the TPP measures under Article 2.2 of the TBT Agreement, “none of the appellants’ claims of error constitute a credible challenge to the Panel’s findings.”⁴⁷ Similarly, Australia asserted that neither Honduras nor the Dominican Republic established a breach of Article 11 of the DSU as to the Panel’s findings under the Article 2.2 of the TBT Agreement analysis regarding trade restrictiveness,⁴⁸ contribution,⁴⁹ and less trade-restrictive alternatives.⁵⁰

⁴² Dominican Republic Appellant Submission, para. 105.

⁴³ *Id.* at para. 105 (italics in original).

⁴⁴ *Id.* at para. 118. See also analysis regarding the two sets of errors, *id.* at paras. 108-586.

⁴⁵ *Id.* at paras. 652-825. We note that the appellant submission of the Dominican Republic does not consistently assert that this error is one under Article 11 of the DSU throughout its arguments regarding the treatment of pre-implementation evidence but it does refer to the error as one under Article 11 of the DSU in paragraph 797 of its submission.

⁴⁶ *Id.* at paras. 1244-1539, 1587-1601.

⁴⁷ Australia Appellee Submission, para. 284.

⁴⁸ *Id.* at paras. 342-349.

⁴⁹ *Id.* at paras. 352-355 and 424-916. Australia highlights in paragraph 355 of its submission that the claims of legal errors relating to the Panel’s contribution analysis under Article 2.2 of the TBT Agreement by Honduras were in actuality alleged factual errors relating to the Panel’s “appreciation of the evidence.”

⁵⁰ *Id.* at paras. 356-423.

2. Article 17.6 of the DSU Limits Appeals to Issues of Law

40. In adopting the DSU, Members did not provide the Appellate Body the authority to review alleged factual errors of a panel. In Article 17.6 of the DSU, Members agreed that the scope of appellate review would be limited such that “[a]n appeal *shall be limited to* issues of law covered in the panel report and legal interpretations developed by the panel.” (italics added).

41. By contrast, Members agreed in Article 11 of the DSU that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” The decision of Members to use the term “should” indicates that Members did not intend to create a legal obligation subject to appellate review. Of note, although sometimes reference is made to a panel’s “duty” under DSU Article 11, the title of the article is “Function of Panels,” not duty. Similarly, Article 11 begins: “The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it” That is, the “objective assessment” is made to carry out (“accordingly”) the “function” the DSU assigns to a panel.

42. The use of “should make”, therefore, was deliberate and carries meaning. Members are all familiar with the difference between “should” and “shall” and choose carefully whether to use “should” or “shall” in particular parts of the agreements they negotiate. In fact, Members have been known to spend weeks or even longer negotiating over exactly this point — whether to use “should” or “shall.” In the text of the DSU, Members chose to use “should” in 21 instances, and to use the word “shall” in 259 instances.⁵¹

43. The comparison of Article 17.6 of the DSU to Article 11 of the DSU makes clear that Members intended for appeals to the Appellate Body to be limited to issues of law. This limitation makes sense as a practical matter, where the panel has the full record before it, the panel has authority under Article 13 to seek information or expert advice, and panel proceedings offer more opportunities for argumentation from the parties. Moreover, limiting appeals to issues of law permits the Appellate Body to make efficient use of its limited time⁵² and its resources perhaps while handling multiple appeals. The panel, assigned exclusively to the dispute at hand, has the tools and resources available to be the proper trier of fact.

⁵¹ These differences are reflected in the dictionary definitions of “should” and “shall”. “Shall” is defined (in relevant part) as “expressing an instruction or command.” Oxford English Dictionary online, third definition of “shall,” available at <<http://www.oed.com>>, accessed 12 October 2012. “Should” is “used to indicate obligation, duty, or correctness, typically when criticizing someone’s actions”; indicating a desirable or expected state; used to give or ask advice or suggestions; used to give advice.” Oxford English Dictionary online, first definition of “should,” available at <<http://www.oed.com>>, accessed 12 October 2012. The first part of this definition may be misconstrued as expressing that “should” is used to indicate an obligation, but the remainder of the definition clarifies that this “obligation” is in the context of criticism or advice – as in when a parent says (politely) to their child: “You should make your bed.” WTO Members collectively “express[] an instruction or command” (shall) when they choose to create and take on legal obligations.

⁵² Article 17.5 of the DSU provides in mandatory terms that “[i]n no case *shall* the proceedings exceed 90 days.” (emphasis added).

44. The requirements established by the Working Procedures for Appellate Review (“AB Working Procedures”) also make clear that appeals are to be limited to issues of law. The requirements for commencement of an appeal,⁵³ appellant’s submission,⁵⁴ and appellee’s submission⁵⁵ only refer to allegations of errors in the issues of law under appeal. None of the AB Working Procedures direct either the appellant or the appellee to include issues of fact in their submission before the Appellate Body.

45. It is not surprising, then, that there is no standard in the DSU under which the Appellate Body is directed to review claims of factual error, since the DSU does not provide for the Appellate Body to conduct any such review. In an early report, the Appellate Body acknowledged this principle that a panel’s findings of fact are in principle outside the authority of the Appellate Body:

Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, *not subject to review* by the Appellate Body.⁵⁶

46. Nevertheless, appellants like Honduras and the Dominican Republic continue to request the Appellate Body to review a panel’s findings of fact. These appeals therefore significantly disrupt the appellate review and dispute settlement system as agreed by Member in the DSU. There already has been tremendous expenditures of both time and resources over the past six years relating to these disputes. Now, even more resources are being expended on these disputes, especially when coupled with the sheer number of factual errors claimed by the appellants in their appeals. In light of these issues, the Appellate Body should take this opportunity to reconsider whether it has authority to review panel fact finding pursuant to a claim that a panel “breached” its function (“should make”) under Article 11 of the DSU, and reject these appeals as falling outside the proper scope of appellate review as set out in Article 17.6 of the DSU.

47. Should the Appellate Body determine nonetheless to review the dozens of claims of erroneous panel fact-finding – despite the clear limitation in Article 17.6 of appeals to issues of law and the absence in the DSU of any standard for the Appellate Body to review panel findings of fact – it should at least reconsider and clarify what it considers to be the standard under which it would review such claims. In its first report, the Appellate Body asserted only a limited

⁵³ Article 20 of the AB Working Procedures provides the requirements for initiating an appeal, stating that the appellant’s notice of appeal be made in a “brief statement of the nature of the appeal, including (i) the identification of the *alleged errors in the issues of law* covered in the panel report and legal interpretations developed by the panel.” (italics added).

⁵⁴ AB Working Procedures Article 21 (appellant submission shall set out “a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof”).

⁵⁵ AB Working Procedures Article 22 (appellee submission shall set out only “errors in the issues of law covered by the panel report and legal interpretations developed by the panel raised in the appellant’s submission, and the legal arguments in support thereof”).

⁵⁶ *EC – Hormones (AB)*, para. 132 (italics added).

authority to review factual errors where there is “an egregious error that calls into question the good faith of a panel.”⁵⁷

48. Over the years, the Appellate Body has stepped away from this high standard and limited review, repeatedly using different formulations that encourage litigants to bring Article 11 of the DSU claims within one or another articulation. The submission of Honduras neatly expresses this dynamic:

The errors of the Panel thus combine many of the categories identified above and *can be described as* a failure to provide an adequate and reasonable explanation of how the facts support the determination made; *or as* a lack of even-handedness and the application of a double standard or proof; *or as* making the case for one of the parties; *or a* failure to conduct a critical and searching analysis; *or as* a willful disregard of the evidence; *or a combination of all of these* which reflect an overall lack of objective assessment when it comes to the examination of the evidence on the degree of contribution of the measure.⁵⁸

Honduras evidently does not know what is the standard and so argues under nearly *every* articulation it can find.

49. The Appellate Body should take this opportunity to confirm it does not have the authority to review panel findings of fact. If it does not, at a minimum, the Appellate Body should clarify that it could review panel fact-finding, notwithstanding the express limitation of Article 17.6 of the DSU, only under the approach it originally set out, “an egregious error that calls into question the good faith of a panel.”⁵⁹ Not surprisingly, Honduras does not list this articulation, which sets a high standard, among those it believes it can meet.

50. Under such an approach to review of claims of factual error under Article 11 of the DSU, it appears that the Panel did not commit any such egregious errors that would call into question the good faith of the Panel.⁶⁰ The United States therefore agrees with Australia that the appellants’ numerous claims of breach of Article 11 of the DSU for factual errors by the Panel in its reports are unfounded.

C. Appeal under Article 7.1 of the DSU

1. Introduction: The Parties’ Arguments

51. The Dominican Republic further alleges that the Panel failed to examine part of the matter referred to the Dispute Settlement Body (“DSB”) under Article 7 of the DSU in regards to

⁵⁷ *Id.* at para. 133.

⁵⁸ Honduras Appellant Submission, para. 710.

⁵⁹ *EC – Hormones (AB)*, para. 133.

⁶⁰ The United States notes that, as a third party to the *Plain Packaging* disputes, it did not have access to all submissions, hearings, and information exchanged among the parties and therefore is restricted in its assessment of the information provided to it as a third participant in this appeal.

the Dominican Republic’s claims that Australia’s measures as applied to individual cigarette sticks are inconsistent with Article 20 of the TRIPS Agreement.⁶¹

52. In response to the claims of the Dominican Republic regarding Article 7.1 of the DSU, Australia argues that the Panel did examine the claims of the Dominican Republic in relation to individual cigarette sticks.⁶² Australia points out in its submission that the Panel made findings in regards to Article 20 of the TRIPS Agreement in respect of the “TPP measures,” which were defined to include requirements “pertaining to the appearance of cigarettes (Section 2.1.4.1)” and that “[t]he Panel understood, and made repeated references to the fact, that the TPP measures prohibit the use of any mark on cigarette sticks (including trademarks) other than an alphanumeric code.”⁶³ We agree with Australia that there is no issue under DSU Article 7.1, and the Dominican Republic is simply seeking to recast under this provision what it should raise as an alleged error in the Panel’s legal conclusion.

2. The Panel Did Not Act Inconsistently with DSU Article 7.1

53. The United States agrees with Australia that there appears to be no issue under of Article 7.1 of the DSU. The report of the Panel addressed the issues raised by the panel requests of the complainants, including the claim by the Dominican Republic that the TPP measures adopted by Australia breached Article 20 of the TRIPS Agreement as to cigarette sticks.

54. Article 7 of the DSU governs a panel’s terms of reference. Article 7.1 of the DSU provides that panels “shall have the following terms of reference,” in the absence of agreement otherwise by the parties to the dispute, “To examine, in the light of the relevant provisions in [the TRIPS, TBT, and GATT Agreements for this dispute], the matter referred to the DSB by [the Dominican Republic, in this dispute] in [the panel request] and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in [those agreements].”

55. Articles 6.2 and 7.1 of the DSU establish that the DSB sets a panel’s terms of reference by referring to it for examination of the matter set out in the panel request. Thus, “the measures included in a panel’s terms of reference,” and thus the measures on which the panel is charged by the DSB to make findings, “must be measures that are in existence at the time of the establishment of the panel” by the DSB.⁶⁴

56. Prior panels and the Appellate Body have explained that there is a significant difference between the claims identified in a panel request, which establish the panel’s terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and clarified progressively in the written and oral submissions.⁶⁵

⁶¹ Dominican Republic Appellant Submission, paras. 1542-1546.

⁶² Australia Appellee Submission, para. 256.

⁶³ *Id.* (citing the Panel Report, paras. 2.2, 2.33, and 2.34, and Figure 8).

⁶⁴ *EC – Chicken Cuts (AB)*, para. 156.

⁶⁵ *Korea – Dairy (AB)*, para. 139; *EC – Bananas III (AB)*, para. 141.

57. Further, the Appellate Body has considered that a “claim,” for purposes of DSU Article 6.2, refers to an “allegation ‘that the respondent party has violated . . . an identified provision of a particular agreement.’”⁶⁶ In contrast, “‘arguments’ . . . are statements put forth by a complaining party ‘to demonstrate that the responding party[]’ . . . does indeed infringe upon the identified treaty provision.”⁶⁷ Article 6.2 of the DSU requires that the claims, but not the arguments, must be specified in the panel request in order to allow the responding party and any third parties to know the legal basis of the complaint.

58. In its panel request, the Dominican Republic requested the panel to determine that Australia’s plain packaging measures are inconsistent with Australia’s obligations under certain provisions of the TRIPS Agreement, the TBT Agreement, and the GATT 1994.⁶⁸ The panel request of the Dominican Republic defined Australia’s plain packaging measures as:

- *Tobacco Plain Packaging Act 2011*, Act No. 148 of 2011, "An Act to discourage the use of tobacco products, and for related purposes";
- *Tobacco Plain Packaging Regulations 2011* (Select Legislative Instrument 2011, No. 263), as amended by the *Tobacco Plain Packaging Amendment Regulation 2012 (No. 1)* (Select Legislative Instrument 2012, No. 29);
- *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011*, Act No. 149 of 2011, "An Act to amend the *Trade Marks Act 1995*, and for related purposes"; and
- Any related measures adopted by Australia, including measures that implement, complement or add to these laws and regulations, as well as any measures that amend or replace these laws and regulations.⁶⁹

59. The panel request further defines the plain packaging measures as “establish[ing] comprehensive regulation of the appearance and form of the retail packaging of tobacco products, as well as of the tobacco products themselves.” The request then goes on to describe that comprehensive regulation, including that “the measures establish that individual cigarettes may not display trademarks, geographical indications or any other marking other than an alphanumeric code for product identification purposes.”⁷⁰ This description of Australia’s comprehensive regulation is separate from the description regarding “the retail packaging of tobacco products” where the measures:

- (i) regulate the appearance of trademarks and geographical indications, including by prohibiting the display of design and figurative features, including those forming part of these intellectual property rights; (ii) prescribe that the brand and variant names forming part of trademarks appear on the front face, top and bottom

⁶⁶ *US – Countervailing Measures (China) (AB)*, para. 4.26.

⁶⁷ *US – Countervailing Measures (China) (AB)*, para. 4.26.

⁶⁸ Request for the Establishment of a Panel by the Dominican Republic, WT/DS441/15, p. 3. The parties did not agree otherwise to other terms of reference.

⁶⁹ Request for the Establishment of a Panel by the Dominican Republic, WT/DS441/15, para. 4.

⁷⁰ Request for the Establishment of a Panel by the Dominican Republic, WT/DS441/15, para. 5.

of the package in a uniform typeface, font, size, colour, and placement; (iii) prohibit the display of other words (except for basic information, including country of origin and manufacturer contact details); and (iv) mandate a matt finish and drab dark brown colour (Pantone 448C) for retail packaging.

60. Under the “legal basis of the complaint,” the panel request of the Dominican Republic refers to “tobacco products” in relation to its claim of a breach of Article 20 of the TRIPS Agreement but does not specifically refer to “individual cigarettes” as it did for the definitions of the plain packaging measures:

These plain packaging measures appear to be inconsistent with Australia's obligations under the following provisions of the *TRIPS Agreement* . . . :

Article 20 of the *TRIPS Agreement*, because the use of trademarks *in relation to tobacco products* is unjustifiably encumbered by special requirements, such as (i) use in a special form, for example, the uniform typeface, font, size, colour, and placement of the brand name, and, (ii) use in a manner detrimental to the trademark's capability to distinguish tobacco products of one undertaking from tobacco products of other undertaking(italics added)

61. Notwithstanding this discrepancy, the Panel in its report set out and defined the measures of Australia under review in these disputes as the “TPP measures” and the Panel then made findings based on and referring specifically back to that definition. The Panel set aside a separate section in the report, Section 2.1.4.1, entitled “Requirements with respect to cigarettes,” when defining the TPP measures for the purposes of the Panel’s analysis.⁷¹ The Panel then did refer to those collective TPP measures when conducting its analysis of the complainants’ claims of breach of Article 20 of the TRIPS Agreement.⁷² The Panel’s findings that the complainants did not establish a breach of Article 20 of the TRIPS Agreement by Australia’s implementation of the TPP measures included, by definition, the part of the TPP measures relating to individual cigarettes themselves. Therefore, it is not necessary to determine whether any possible differences between the descriptions within the panel request of the Dominican Republic had any effect on the terms of reference.

62. The report of the Panel addressed the issues raised by the panel requests of the complainants, including the claim by the Dominican Republic that the TPP measures adopted by Australia breached Article 20 of the TRIPS Agreement as to individual cigarette sticks. The United States agrees with Australia that the Panel did examine the matter within its terms of reference under Article 7.1 of the DSU, including the Dominican Republic’s Article 20 claim relating to individual cigarette sticks.

⁷¹ Panel Report, para. 2.34 (“Division 3.1 of the TPP Regulations specifies requirements with respect to cigarettes. The paper casing and lowered permeability band (if any) must be white, or white with an imitation cork tip. A cigarette may be marked with an alphanumeric code, which may appear only once on the cigarette. . . .”).

⁷² E.g. Panel Report, para. 7.2531 (“We first consider the nature and extent of the encumbrances resulting from the trademark requirements of the TPP measures, and then reasons for which these special requirements are applied.”).

63. Australia noted in its appellee submission that the Dominican Republic had an opportunity to raise issues of concern regarding determinations of evidence in the Panel’s report during the interim review process, but chose not to do so.⁷³ This opportunity also would have included raising the issue regarding the Panel’s findings as to individual cigarette sticks and Article 20 of the TRIPS Agreement.

64. The United States notes that the Dominican Republic’s claim of error under DSU Article 7.1 is essentially a recasting of a substantive claim that the Panel made an erroneous legal conclusion by failing to consider and make findings on its Article 20 claims as to individual cigarette sticks. That issue of law can and should be raised directly as a legal error relating to Article 20, rather than an alleged procedural error relating to the Panel’s fulfillment of its terms of reference. If the panel’s legal conclusion is appropriately appealed, the Appellate Body may examine whether the alleged claim was set out in the panel request and, therefore, within the terms of reference; whether the complaining party made out a prima facie case with respect to that claim; whether the responding party rebutted that case; and whether the panel made findings on that claim or need not have, as findings on the claim would not assist the DSB in making the recommendation under DSU Article 19.1 to bring a WTO-inconsistent measure into conformity with the WTO agreements.⁷⁴

65. Such a review should come under an appeal on the merits of the Panel’s legal conclusion. Under such an appeal, the Dominican Republic would have to show an error in assessment of its claim and arguments that led to a false conclusion of no breach of Article 20. Without an appeal under Article 20 and such a demonstration by the Dominican Republic that a different legal conclusion should have been reached, there would be no reason for the Appellate Body to make findings on an issue that would not assist the DSB in making a recommendation under the DSU.

IV. CONCLUSION

66. The United States appreciates the opportunity to provide its views in this appeal and hopes that its comments will be useful to the Appellate Body.

⁷³ See, e.g., Australia Appellant Submission, para. 459.

⁷⁴ See DSU Art. 7.1 (terms of reference includes “to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)”).